COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-276
18-P-314

COMMONWEALTH

vs.

STEPHEN J. MERISMA (and a companion case[1]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Drugs and certain paraphernalia associated with drug distribution were found in the apartment shared by the codefendants Dario Merisma and Stephen Merisma.[2] At their trial, a police detective testified both as an expert and a percipient witness; after he explained how such paraphernalia generally is used in connection with the sale of narcotics, he opined as to a baggie he found in the apartment that "narcotics were packaged in that plastic baggie for sale." This and other testimony, going directly to the disputed issue whether the defendants possessed narcotics for distribution, was beyond the scope of permissible expert testimony and was improper. On appeal, the

[1] Commonwealth vs. Dario Merisma.

[2] Because the defendants share a surname, we refer to each by his first name.

defendants assert that this and other errors require us to vacate their convictions of one count each of (1) possession of a class B controlled substance (cocaine) with intent to distribute, pursuant to G. L. c. 94C, § 32A; (2) possession of a class D controlled substance (marijuana) with intent to distribute, pursuant to G. L. c. 94C, § 32C; and (3) possession of a class B controlled substance (oxycodone), pursuant to G. L. c. 94C, § 34.[3] Because, inter alia, the defendants' opposition to the Commonwealth's motion in limine to permit the detective to testify as an expert did not preserve the argument they raise on appeal, the defendants neither objected to nor moved to strike the improper testimony during the trial, and there is no substantial risk of a miscarriage of justice, we affirm.

Background. In June 2014, as police officers prepared to execute a search warrant at a residence in Waltham where the defendants shared a small basement apartment, they observed the defendants, who are identical twins, leave the apartment, enter Stephen's Mercedes, and drive away. Several officers in unmarked cars followed the defendants, who drove to a Waltham gym and stopped in the rear of the large parking lot, away from other vehicles. A second car then pulled up next to them. The

[3] A charge against each defendant of distribution of a class B substance (cocaine), G. L. c. 94C, § 32A, was dismissed prior to jury empanelment with each defendant's consent.

driver got out of that car, entered the back seat of the Mercedes, and returned to her car thirty seconds later.

The officers surrounded the two vehicles with their cruisers and approached with guns drawn, displaying their badges and identifying themselves as police officers. The driver of the Mercedes, who later identified himself as Stephen, accelerated the car backwards and struck the cruiser behind him, forcing one officer to jump out of the way.[4] The officers ordered the defendants out of the Mercedes and searched it and the defendants, finding an unspecified amount of cash. Officers searched the second car and found a "corner bag" of cocaine under the dashboard, hypodermic needles, and another unspecified drug. The officers arrested both defendants.[5]

At about the same time as the arrest, other officers, overseen by Waltham Police Detective Jason Ferranti, executed the search warrant at the Waltham residence. They focused on the basement apartment they had seen the defendants leaving. The apartment consisted of two bedrooms, a kitchen, a bathroom, and a hallway. One bedroom was very small, just big enough to accommodate the mattress on the floor. The other bedroom had a

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[4] Stephen was charged with assault by means of a dangerous weapon (motor vehicle), G. L. c. 265, § 15B (b); the judge allowed his motion for a required finding of not guilty on this charge at the close of the Commonwealth's case.

[5] Three persons in the second car also were charged with various drug offenses.

bed, a television stand, and a dresser and closet containing men's clothing.

In a dresser drawer, officers found multiple items consistent with drug distribution, including two "corner bags" containing white powder, later determined to be cocaine, weighing 3.89 grams and 0.27 grams respectively. The bags were wrapped in tinfoil; Detective Ferranti testified that often larger supplies of cocaine are delivered to street level dealers in corner baggies wrapped in tinfoil. Next to the cocaine was a digital scale. Next to these items lay "diaper bags" and "cut off bags." Detective Ferranti explained that such bags are the remnants of rectangular glassine baggies after they have been used for packaging narcotics.[6] Also in the drawer was $385 in cash concealed in a sock.

On top of the dresser was a container of glutamine. Glutamine, Detective Ferranti explained, is a white powder nutritional supplement that is similar in texture to cocaine and is used as a "cutting" or diluting agent in the drug distribution business. Also on top of the dresser were a

[6] Specifically, he testified that a "corner bag" is created by putting narcotics in the corner of a baggie, twisting and tying the corner above the narcotics, and then cutting off the resulting corner package. The baggie can be reused to make another corner bag, using the opposite corner and leaving a remnant that looks like a diaper. A section of this "diaper bag" then may be used again to further package narcotics, resulting in a "cut off bag."

registry of motor vehicles certificate of registration issued to Dario and a receipt for a registry certificate of title issued to Stephen.

Three cell phones were also found in the bedroom. Detective Ferranti testified that drug distributors often have multiple cell phones to facilitate communication with suppliers and customers. In the bedroom closet, in a jacket pocket, was a bag containing 0.84 grams of marijuana, packaged in a manner "consistent with the cut offs and diaper bags" found in the dresser drawer. Underneath the bed was a vacuum-sealed plastic baggie emitting a strong odor of marijuana. Detective Ferranti testified that when marijuana is packaged in large quantities (usually one pound), it often is placed in a vacuum-sealed package, to compress it for transport and to mask its odor.

On the kitchen table were checks in Dario's name, mail addressed to the defendants at the Waltham residence, and the defendants' drivers licenses bearing that same address. In a kitchen cabinet were two corner baggies of a cutting agent that was similar in texture to the glutamine found on the dresser in the bedroom. In another cabinet were glassine sandwich bags and a bag containing 8.73 grams of marijuana. Under the stove were two "zip lock" bags containing marijuana with a total weight of 86.65 grams. An oxycodone pill was also found in a kitchen cabinet.

Discussion. The defendants raise distinct issues on appeal; however, they both argue that their convictions cannot stand in view of the admission of portions of Detective Ferranti's testimony. Accordingly, we address that common argument first.

1. Expert witness testimony. The defendants contend that three portions of Detective Ferranti's testimony were improper. First, after Detective Ferranti explained the use of diaper and cut off bags in connection with narcotics distribution, he was asked "what version of diaper bag" was found in the defendants' top dresser drawer, and he answered, "In the top drawer, there was a bag. It's a square with the center cut out, meaning -- so narcotics were placed in the middle of it, it was tightly tied off and then cut. You're left with a circle" (emphasis added). Second, after a sidebar conference discussed infra, the detective was asked, "[W]hat if any significance would using the center of the bag have to you," and he answered that "based on my training and experience . . . narcotics were packaged in that plastic baggie for sale" (emphasis added). Third, the detective was asked the significance of glutamine, and after explaining the use as cutting agents of nutritional supplements that are the same color as the drug being distributed, he testified that "in this case it would be cocaine, so it would be white in color, and it has a very similar texture" (emphasis added).

The defendants did not object to any of the questions or move to strike any of the answers just quoted. Nor do they dispute that an expert may properly testify on the general practices of drug distributors regarding the packaging of drugs and the use of cutting agents. Rather, because Detective Ferranti was both an expert and a percipient witness, and he applied his expert knowledge to opine that specific items he helped find in the defendants' apartment indicated drug distribution, the defendants argue that his testimony was particularly prejudicial.

"Otherwise qualified expert testimony is admissible if, 'in the judge's discretion, the subject [of such testimony] is not within the common knowledge or common experience' of the trier of fact, and the testimony will assist the trier of fact in determining a fact in issue or in understanding the evidence." Commonwealth v. Miranda, 441 Mass. 783, 792-793 (2004), quoting Commonwealth v. Francis, 390 Mass. 89, 98 (1983). "It is settled law that trial judges have broad discretion to allow the use of narcotics investigators as experts in drug cases." Miranda, 441 Mass. at 793. A decision to allow such testimony "will be reversed only where the admission constitutes an abuse of discretion or error of law." Commonwealth v. Villanueva, 47 Mass. App. Ct. 905, 907 (1999).

When reviewing whether expert evidence is proper, our review does not turn exclusively on the "precise locution used"; instead, we focus on whether the testimony is explanatory, serving an "educative function" to assist jurors in interpreting evidence that lies outside of common experience. Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998). Although expert witness testimony may and should be grounded in the facts of the case at hand, the expert should not "directly express his views on the defendant's guilt." Id. at 579. "There [is] no necessity for him to link [his knowledge of drug distributors' general practices] with his personal observations and conclude, in so many words, that [a] defendant was involved in illegal drug sales." Id. at 581.

Here, we agree that the abovementioned portions of Detective Ferranti's testimony crossed the line from proper explanatory testimony to improper opinion that these defendants possessed drugs with the intent to distribute them. See, e.g., Commonwealth v. Woods, 419 Mass. 366, 368, 374-375 (1995) (improper for officers to testify that they believed defendant was engaged in drug dealing or selling cocaine); Commonwealth v. Acosta, 81 Mass. App. Ct. 836, 842 (2012) (improper to testify, "But the number of bags here? I would say they're offered for sale"); Commonwealth v. Grissett, 66 Mass. App. Ct. 454, 456, 458 (2006) (improper to testify that drugs seized from defendant

were "far more than a user would carry on his person" and "clearly in my opinion for drug distribution"); Tanner, 45 Mass. App. Ct. at 580 (improper to testify that "from my experience, I believed a drug transaction had taken place").

We do not agree, however, that these errors were preserved. First, the defendants' unsuccessful objections to the Commonwealth's motion in limine related to whether Detective Ferranti should be allowed to testify at all;[7] these did not preserve the argument they make on appeal that specific portions of the detective's trial testimony went beyond the scope of permissible expert testimony. See Commonwealth v. Almele, 474 Mass. 1017, 1019 (2016). It was incumbent on the defendants to object at trial to preserve the issue they now raise. See Commonwealth v. Grady, 474 Mass. 715, 720 (2016) ("Where what is being addressed and resolved at the motion in limine stage differs from what occurs at trial, the defendant still must object at trial to preserve his or her appellate rights").

At trial, as noted supra, the defendants neither objected to nor moved to strike Detective Ferranti's testimony. In particular, they failed to act when, following a sidebar,

[7] The defendants objected based on the failure of the Commonwealth to disclose Detective Ferranti as an expert under Mass. R. Crim. P. 14 (a) (1) (A), as amended, 444 Mass. 1501 (2005). They also argued that because Detective Ferranti was a percipient witness, his testimony as an expert was barred by Tanner, 45 Mass. App. Ct. at 579-582, and like cases.

Detective Ferranti testified that the significance of the bag found in the defendants' dresser was "that narcotics were packaged in that plastic baggie for sale." Although Dario asserts that the objection to the question preceding the sidebar preserved the objection to this testimony, we are unpersuaded. Just before the sidebar, the prosecutor asked whether "the individual who was using that bag had used both of the corners . . . and then the center?" The defendants objected,[8] and the judge called for a sidebar and sustained the objection. The judge explained, "[T]he form of the question [the prosecutor] asked both in its leading nature and also the information that's being sought, I'm not -- I'm not going to permit." After the sidebar, when the prosecutor rephrased the question and Detective Ferranti's response fell outside the parameters of what was permitted for an expert witness, it was incumbent on the defendants to articulate any objection clearly or to move to strike the answer. See Grady, 474 Mass. at 720. Nothing in the sidebar could have lulled the defendants into thinking that they

[8] Stephen's counsel objected; there was no need for Dario to separately object. See Commonwealth v. Lieu, 50 Mass. App. Ct. 162, 165 n.3 (2000) (codefendant's objection preserves issue for both codefendants).

had preserved objections to all direct opinions of guilt expressed by Detective Ferranti.[9] See Almele, 474 Mass. at 1019.

Thus, on appeal, we examine the errors to determine whether they created a substantial risk of a miscarriage of justice -- that is, whether, in the context of the entire trial, there is a "serious doubt whether the result of the trial might have been different had the error[s] not been made" (citation omitted). Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). Here, in view of the strong evidence of the defendants' intent to distribute the marijuana and cocaine they possessed, we have no such doubt.[10]

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[9] During the sidebar, the judge noted that the objections raised during the motion in limine were preserved; however, as discussed supra, those objections were not based on the permissible scope of the detective's testimony. In allowing the motion in limine, the judge had ruled that the detective's expert testimony would be limited to "his opinion regarding the significance of certain drug paraphernalia." But this ruling did not permit the detective to opine about specific items actually found in the defendants' apartment; at the sidebar and on several other occasions, the defendants' objections to questions seeking such opinions were sustained. We note that, although portions of the sidebar were inaudible and thus not transcribed, if the defendants believed that the missing portions were material to their appeals, it was their "burden to settle the record as provided in Mass. R. A. P. 8 (c) and (e)[, as appearing in 378 Mass. 932 (1979)]." Commonwealth v. Woody, 429 Mass. 95, 98 (1999). (We note that the transcripts and the defendants' briefs were filed in these appeals before the March 1, 2019, effective date of the recent revisions to the Massachusetts Rules of Appellate Procedure, 481 Mass. 1601 [2019].)

[10] The detective's improper testimony went to the issue of intent to distribute the cocaine and marijuana; we see no likelihood

That evidence began with the apparent drug transaction in the parking lot, particularly considered in light of the defendants' immediate attempt to flee, showing consciousness of guilt. Even more damaging were the items found in the defendants' apartment. The two different-sized bags of cocaine[11] (wrapped in tinfoil as the detective said was a common practice among drug distributors) and the glutamine usable as a cocaine cutting agent (including a container found on the dresser, rather than the kitchen where a nutritional supplement might more naturally be kept) all pointed to distribution rather than personal use. So did the four different-sized bags of marijuana -- as well as the vacuum-sealed bag, of the type that the detective testified was commonly used for larger quantities of marijuana and that smelled strongly of that substance. Likewise pointing to distribution were the diaper bags and the cut off bags,[12] the other packaging materials, the digital scale, the

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that it affected the jury's deliberations on whether the defendants possessed those substances, let alone the oxycodone.

[11] That the bags contained different amounts of cocaine (3.89 grams and 0.27 grams) and were unopened when found indicates repackaging for distribution, rather than possession for personal use.

[12] As suggested by Dario, we have viewed exhibit 3, which includes the diaper and cut off bags, as well as several other exhibits. Although it is unclear how many of the bags are diaper bags as opposed to cut off bags, the detective repeatedly testified that "diaper bags" (plural) and "cut off bags" (plural) were found, and he was not cross-examined on the point. In any event, the substantial total number of such bags is strongly indicative of the repackaging of drugs, i.e., of

multiple cell phones, and the concealed cash. Here, in view of the strength of the Commonwealth's case, including the properly admitted expert testimony and physical evidence, "it is unlikely that [any] improper comment was a decisive factor for the jury." Tanner, 45 Mass. App. Ct. at 580. Nor do we find the defendants' other arguments on this point persuasive.[13] We have no serious doubt whether the result of the trial might have been different had the errors not been made. See Randolph, 438 Mass. at 297.

2. Testimony regarding known drug users. Dario contends that it was impermissible for an officer to testify that the occupants of the second car in the parking lot were "know[n] . . . drug users." Admission of such guilt-by-association testimony was error. See Commonwealth v. Ortega, 441 Mass. 170, 180 (2004); Commonwealth v. Best, 50 Mass. App. Ct. 722, 725 (2001). Because the defendants did not object, however, we

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distribution rather than personal use. (Having considered exhibit 3, we conclude that no action is necessary on Dario's motion to add it to the record appendix.)

[13] Although Dario asserts that the prosecutor's closing argument "heavily relied" on the improper testimony, we see nothing in that argument that referred to the improper testimony, as opposed to the detective's testimony about the practices generally used by drug distributors. Nor do we agree that a note received by the judge, stating "deadlocked right now, still deliberating," shows that the issue of intent to distribute was a close one. The judge was uncertain of the note's origin, but the clerk's handwritten exhibit list states that it was written by a court officer. Even if, arguendo, the note were a reliable indication of difficult deliberations, it provides no insight into what issue(s) the jury found difficult.

review only to determine whether the error created a substantial risk of a miscarriage of justice. See id.

We see no such risk here, in light of the strong evidence of intent to distribute reviewed supra, the strong evidence of possession reviewed infra, the fleeting nature of the reference, and the fact that, given the hypodermic needles (as well as cocaine and another drug) found concealed in the second car, the jury would likely have inferred in any event that at least one occupant of that car was a drug user.

3. Sufficiency of the evidence. The defendants assert that the Commonwealth presented insufficient evidence that they possessed the drugs. We consider the evidence and inferences therefrom in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979), keeping in mind that "[a]n inference, if not forbidden by some rule of law, need only be reasonable and possible; it need not be necessary or inescapable." Commonwealth v. Beckett, 373 Mass. 329, 341 (1977). The Commonwealth was required to prove that the defendants "(1) possessed [the drugs], (2) knowingly or intentionally, and (3) with intent to distribute." Commonwealth v. LaPerle, 19 Mass. App. Ct. 424, 425 (1985). The Commonwealth was permitted to prove constructive possession by showing that the defendants had the ability and intention to exercise

dominion and control over the items. See Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989).

Viewing the evidence in the light most favorable to the Commonwealth, the jury could reasonably have found that Dario and Stephen engaged in a drug transaction in the parking lot, that both defendants resided in the basement apartment (given the multiple documents found there and bearing their names), and that they possessed the cocaine, marijuana, and oxycodone found there, along with the numerous other indicia of drug distribution. Although the cocaine was found only in the dresser in one of the bedrooms, the second bedroom was small, with room only for a mattress. The jury could reasonably have found, particularly given the registry documents containing both defendants' names found on the dresser, that both defendants stored their personal items in the dresser and closet in the first bedroom, and thus that both defendants possessed the drugs found there. See Commonwealth v. Proia, 92 Mass. App. Ct. 824, 832-834 (2018) (discovery of drugs under dresser used by defendant was sufficient to prove her constructive possession of those drugs). The jury could also have found that such possession was shared jointly by both defendants.[14] Most of the

[14] There was no need to prove which defendant slept in which bedroom. "Possession need not be exclusive but may be joint, and such joint possession may be proved by circumstantial

marijuana was found in the kitchen, where documents bearing each of the defendants' names were also found, tying each of them to that area. See id. This evidence was sufficient. See Latimore, 378 Mass. at 677.

4. Identification of Stephen. We reject Stephen's argument that, because the Commonwealth did not adequately identify him at trial as distinct from his identical twin brother and codefendant Dario, the evidence of his guilt was insufficient. No doubt, "an essential element to be proved by the Commonwealth is that the individual who appears before the court as the defendant is the same person who is the subject of the indictment or complaint then on trial and the same person referred to in the evidence." Commonwealth v. Davila, 17 Mass. App. Ct. 511, 512 (1984). But that was proved here. There was ample testimony identifying the brothers sitting at the defense table as the same brothers who were seen leaving the basement apartment (where driver's licenses bearing their names and photographs were found), and who separately identified themselves as Stephen and Dario, respectively, to the arresting officers in the parking lot. The evidence as to each was "sufficient to support a reasonable inference that the defendant

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evidence." Commonwealth v. Dinnall, 366 Mass. 165, 168-169 (1974). See Proia, 92 Mass. App. Ct. at 834.

was the individual described by the witnesses."[15] Commonwealth v. Sheehan, 5 Mass. App. Ct. 754, 763 & n.8 (1977), S.C. 376 Mass. 765 (1978). See Commonwealth v. Cavanaugh, 7 Mass. App. Ct. 33, 36 (1979).

Because the Commonwealth proceeded on a theory of joint possession, there was no need to specifically identify which brother at the defense table was Stephen and which was Dario. Contrast People v. Lopez, 72 Ill. App. 3d 713, 716-717 (1979) (because differences in conduct by identical twin brother codefendants affected their respective criminal liabilities, their convictions were defective based on failure to differentiate them at trial).

Nor does Stephen point to any actual prejudice flowing from the lack of differentiation between him and Dario at trial. He speculates that the jury, if they knew which brother was which, could have observed differences in his and Dario's courtroom demeanors and then decided on that basis to convict one brother but acquit the other. But Stephen offers no reason to think

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[15] Stephen's reliance on Commonwealth v. Koney, 421 Mass. 295 (1995), is unavailing. That decision, like those cited in the text, merely says there must be proof that the defendant in the courtroom is the same person that engaged in the criminal conduct at issue -- including being the same person that was convicted of prior offenses, if such convictions are an element of the crime for which the defendant is on trial. Id. at 301-302. Koney has nothing to do with differentiation between codefendants where both were proved to have engaged in criminal conduct.

that those demeanors actually differed, and the jury's ability to observe a defendant's demeanor is not an essential element of every criminal trial. Cf. Commonwealth v. Susi, 394 Mass. 784, 788-789 (1985) (visually impaired juror may not be disqualified per se, but only where defendant's right to fair trial would be threatened, e.g., where identification was central issue and depended on visual evidence); Commonwealth v. Muckle, 59 Mass. App. Ct. 631, 639-640 (2003) (where defendant voluntarily and without cause absents himself after trial begins, trial may continue to conclusion, provided specified protocol is followed).[16]

5. Stephen's ineffective assistance of counsel claim. Stephen asserts that trial counsel was ineffective because he failed to (1) challenge Detective Ferranti's testimony, (2) challenge the evidence tying Dario to the apartment, and (3) focus on certain evidence during closing argument. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). In this direct appeal, "[w]e keep in mind that an ineffective assistance of counsel challenge made on the trial record alone is the

[16] As Stephen suggests, the ability to observe a defendant's demeanor may also be important to a judge's determination of the defendant's competence to stand trial, see Commonwealth v. McMahon, 443 Mass. 409, 422-423 (2005), or to a jury's determination of the defendant's mental capacity to commit the crime charged, see Commonwealth v. Louraine, 390 Mass. 28, 32-38 (1983). These illustrations merely reinforce how speculative Stephen's claim of prejudice is in this case.

weakest form of such a challenge because it is bereft of any explanation by trial counsel for his actions and suggestive of strategy contrived by a defendant viewing the case with hindsight." Commonwealth v. Peloquin, 437 Mass. 204, 210 n.5 (2002). Stephen has not shown that counsel was ineffective.

First, our conclusion supra that Detective Ferranti's admitted testimony created no substantial risk of a miscarriage of justice disposes of any ineffective assistance claim premised on failure to object to that testimony. See id. at 210 n.4 ("The test in . . . Saferian . . . and the substantial risk of a miscarriage of justice test are, substantively, two sides of the same coin").

Second, Stephen argues that counsel should have challenged the admission, as against him, of evidence tying Dario to the apartment. Stephen appears to argue that the documents bearing Dario's name were irrelevant to proving Stephen's guilt. Even if that were true, however, Stephen utterly fails to explain how he was prejudiced by such evidence. To the contrary, it furnished the basis for him to assert, as counsel did in closing argument, that it was possible some of the incriminating items in the apartment belonged not to him but to Dario.[17]

[17] Stephen suggests that, had counsel objected, the Commonwealth would have been unable to differentiate him from Dario and could not have addressed the objection by suggesting or acquiescing to

Third, Stephen suggests that counsel's closing argument should have focused on the evidence that one of the two bedrooms in the apartment was sparsely furnished -- evidence he claims was "critical to [his] defense." But, given the absence of any evidence that it was Stephen rather than Dario who slept in that bedroom, and more importantly in light of the evidence of joint possession discussed supra, we are not persuaded that counsel's choice of themes for closing argument was manifestly unreasonable. See Commonwealth v. Degro, 432 Mass. 319, 332-333 (2000).

Judgments affirmed.

By the Court (Neyman, Sacks & Wendlandt, JJ.[18]),

Joseph F. Stanton

Clerk

Entered: July 24, 2019.

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a limiting instruction. But Stephen offers no factual support for the first assertion and no legal support for the second.

[18] The panelists are listed in order of seniority.